IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 27, 2002

GEARLD SMITH v. ARTHER BENNETT,[1] ET AL.

Appeal from the Circuit Court for Davidson County
No. 01C-766 Thomas W. Brothers, Judge

No. M2001-03152-COA-R3-CV - Filed July 30, 2002

Gearld Smith, a prisoner in state custody, filed a complaint *pro se* styled "for violation of civil rights pursuant to Title 42 U.S.C. § 1983." The defendants, all of whom are state employees, filed a motion for summary judgment supported by affidavits. The plaintiff responded with his own affidavit, the affidavits of two other prisoners, and documents. The trial court granted the defendants' motion. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

Gearld Smith, Tiptonville, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Nichon Shannon, Assistant Attorney General, for the appellees, James B. Bennett, Joy Griffin, Glen Bargery, A. Alfred Gifford, Candace Prince, Mary Louise Gouldin, Sheila Jones, June Swift, Jeanine Stanley, Cherry Lindamood and Jim Rose.

OPINION

I.

The plaintiff's complaint alleges that he is entitled to relief, including compensatory and punitive damages, because of the failure of certain prison personnel to honor his doctor's direction that he was to be housed on a lower floor and assigned to a lower bunk. These restrictions were

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[1] The defendant "Arther Bennett" is actually James B. Bennett.

originally due to back surgery on June 22, 1999. The complaint further alleges that his doctor's instructions were initially followed but later ignored. On August 28, 2000, while "attempt[ing] to climb the stairs," the plaintiff fell. As a result of his fall, he was treated by medical personnel and was prescribed "medications."

The trial court granted the defendants' motion for summary judgment by an order entered November 28, 2001. In that order, the trial court recited the material facts found by it not to be in dispute; it also noted facts that are in dispute. The court's comments – all of which we find to be correct – are as follows:

> The Plaintiff is an inmate of the Tennessee Department of Corrections ("TDOC"), incarcerated at the Northwest Correctional Complex ("NCC"). During his incarceration, Plaintiff underwent treatment resulting in the removal of a disk from his back. After this surgery, a Doctor's notation in Plaintiff's file indicated that he was to be housed on a lower floor, and was to sleep on a lower bunk.
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> Upon his return to NCC, and after several trips away from NCC for follow-up care or court appearances, Plaintiff was housed in compliance with the lower floor/lower bunk order. However, on one occasion, Plaintiff was mistakenly assigned to the top floor. Plaintiff informed staff members at NCC that he was to receive a lower floor/lower bunk assignment, and after the error was recognized Plaintiff was informed that he would soon be moved. However, before the Plaintiff was relocated, he fell while climbing a flight of stairs.
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> The undisputed facts of this case indicate that staff members of the NCC mistakenly assigned the Plaintiff to a top floor upon his return from a court appearance. This mis-assignment was made in the "count room" of the facility, when an employee in the count room failed to properly examine the Plaintiff's file. Although this oversight was not immediately corrected by the NCC staff, the Plaintiff has presented no evidence to show that any delays in his relocation were generated by the deliberate indifference of the Defendants.
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> The parties have submitted conflicting affidavits concerning who among the Defendants knew, and when those Defendants knew, of the Plaintiff's lower floor/lower bunk requirements.

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II.

In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn.1993).

The party seeking summary judgment has the initial burden of demonstrating that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. ***Byrd***, 847 S.W.2d at 215. Once the moving party satisfies its burden, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact requiring submission of the case to a trier of fact. ***Id.***

Since summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44 (Tenn. Ct. App.1993).

III.

Title 42 of the United States Code, Section 1983, provides, in pertinent part, as follows:

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

In order to establish a claim for inadequate medical care under this statute, the plaintiff must prove that those persons charged with his care demonstrated a "deliberate indifference" to the plaintiff's "serious medical needs." ***Estelle v. Gamble***, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976); ***Molton v. City of Cleveland***, 839 F.2d 240, 243 (6th Cir. 1988). "The conduct for which liability attaches...must demonstrate deliberateness tantamount to an intent to punish." ***Molton***, 839 F.2d at 243 (citation omitted). This requires more than a showing of negligence or even gross negligence. *See* ***Walker v. Norris***, 917 F.2d 1449, 1454 (6th Cir. 1990). Constitutional liability

cannot be based upon a claim of negligent treatment. ***Estelle***, 429 U.S. at 105-06; ***Roberts v. City of Troy***, 773 F.2d 720, 724 (6th Cir. 1985); ***Byrd v. Wilson***, 701 F.2d 592, 595 n.2 (6th Cir. 1983). Therefore, the plaintiff in the instant case must show that the defendants were aware of, but chose to disregard, a substantial risk of serious harm to him. *See* ***Farmer v. Brennan***, 511 U.S. 825, 847, 114 S. Ct. 1970, 1984, 128 L. Ed. 2d 811 (1994).

In order to sustain a claim against a defendant under 42 U.S.C. § 1983, a plaintiff must specify the acts or omissions of the defendant which led to the violation of the plaintiff's rights. *See* ***Dunn v. Tennessee***, 697 F.2d 121, 125 (6th Cir. 1982). Mere conclusory allegations are insufficient. ***Smith v. Rose***, 760 F.2d 102, 106-7 (6th Cir. 1985).

With respect to supervisory personnel, the law is clear that liability under 42 U.S.C. § 1983 "must be based [up]on more than the right to control employees." ***Bellamy v. Bradley***, 729 F.2d 416, 421 (6th Cir. 1984). The theory of *respondeat superior* will not support a claim of § 1983 liability. ***Monell v. New York***, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978); ***Hays v. Jefferson County***, 668 F.2d 869, 874 (6th Cir. 1982). "At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." ***Hays***, 668 F.2d at 874.

IV.

The undisputed material facts fail to demonstrate that the named defendants were deliberately indifferent to the plaintiff's medical needs. There are simply no facts, or reasonable inferences, suggesting that the conduct of any of the defendants was such as to be "tantamount to an intent to punish." ***Molton***, 839 F.2d at 243. While there is a dispute in the record as to who knew of the plaintiff's medical restrictions and when they knew of them, we agree with the trial court that the plaintiff "has failed to assert facts that would support his claim for relief." We also agree with the trial court that two of the defendants – Jim Rose and Cherry Lindamood – are not charged with any specific acts of misconduct; rather they are sued, apparently, because of their supervisory responsibilities. As we have previously indicated, liability under § 1983 "must be based on more than the right to control employees." ***Bellamy***, 729 F.2d at 421.

Viewing the facts in the light most favorable to the plaintiff, his case is nothing more than a claim for negligence or, at most, gross negligence. This is simply not enough under § 1983. ***Walker***, 917 F.2d at 1454. We find the facts that are material to a claim for actionable deliberate indifference to "serious medical needs" are not in dispute and that those undisputed material facts show that the defendants are entitled to summary judgment.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed against the appellant, Gearld Smith. This case is remanded to the trial court for the collection of costs assessed there, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE